

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

LEVI MICAH BARTER,

Petitioner,

v.

JERRY BROWN, et al.,

Respondents.

No. CV 14-2418-DMG (PLA)

**ORDER TO SHOW CAUSE RE LACK OF  
EXHAUSTION**

On March 31, 2014, petitioner, who is currently in state custody, filed a Petition for Writ of Habeas Corpus (the "Petition"). According to the Petition, petitioner is challenging his 2009 conviction in the Los Angeles County Superior Court under California Penal Code §§ 245(a)(1), 12022.7(a). (See Petition at 1-2). For the reasons expressed below, it appears that the instant Petition is unexhausted.

As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The habeas statute explicitly provides that a habeas petition brought by a person in state custody "shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28

1 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived  
 2 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

3 Exhaustion requires that petitioner's contentions be fairly presented to the state supreme  
 4 court even if that court's review is discretionary. O'Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119  
 5 S.Ct. 1728, 144 L.Ed.2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077, n.3 (9th Cir. 2000).  
 6 Petitioner must give the state courts "one full opportunity to resolve any constitutional issues by  
 7 invoking one complete round of the State's established appellate review process" in order to  
 8 exhaust his claims. O'Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the  
 9 prisoner has described in the state court proceedings both the operative facts and the federal legal  
 10 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887,  
 11 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438  
 12 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. California Dep't of  
 13 Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,  
 14 218 F.3d 1017 (9th Cir. 2000). Petitioner has the burden of demonstrating that he has exhausted  
 15 available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

16 Here, it appears that petitioner has not exhausted his state judicial remedies in connection  
 17 with this matter. (See Petition at 2-5). Petitioner indicates that, although he did not appeal his  
 18 judgment of conviction in the California Court of Appeal, he did file a "Motion for Resentencing  
 19 Habeas Corpus" in the California Superior Court, which he asserts was denied in January, 2014.  
 20 (See Petition at 2-3). Petitioner concedes that he has not filed any "petitions, applications, or  
 21 motions . . . with respect to this judgment" in the California Court of Appeal. (See Petition at 3).  
 22 He further concedes that he has not filed any petitions with respect to this judgment in the  
 23 California Supreme Court (see Petition at 4), and did not raise any of the four grounds for relief  
 24 in the California Supreme Court. (See Petition at 6-9).<sup>1</sup> As the instant Petition appears to be  
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26 <sup>1</sup> Petitioner explains that he "did not file a petition, application or motion (e.g., a Petition for  
 27 Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the  
 28 grounds raised in this federal Petition," because the ground for relief on which the Petition is, in  
 part, based, "is a federal question to be adjudicated in a federal court." (See Petition at 5). This  
 (continued...)

1 unexhausted, it is subject to being dismissed without prejudice. Greenawalt v. Stewart, 105 F.3d  
 2 1268, 1271, 1273-75 (9th Cir. 1997).

3 Further, a petitioner seeking habeas corpus relief must name the state officer having  
 4 custody of him or her as the respondent to the Petition. See Rule 2(a), Rules Governing Section  
 5 2254 Cases in the United States District Courts. This person typically is the warden of the facility  
 6 in which the petitioner is incarcerated. Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th  
 7 Cir. 1994); Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam) (explaining  
 8 that a federal habeas petitioner's immediate custodian is the only party that can actually produce  
 9 "the body" of the petitioner); Dunne v. Henman, 875 F.2d 244, 249 (9th Cir. 1989) (holding that  
 10 where a prisoner files a § 2241 petition challenging the manner of execution of his sentence, the  
 11 "prisoner must name the warden of the penitentiary where he is confined as respondent"). See  
 12 also Ortiz-Sandoval v. Gomez, 81 F.3d 891, 895-96 (9th Cir. 1996), as amended (holding that  
 13 California Director of Corrections may, under certain circumstances, be properly named as a  
 14 respondent in a habeas action). Failure to name the correct respondent deprives federal courts  
 15 of personal jurisdiction. Stanley, 21 F.3d at 360; Dunne, 875 F.2d at 249. As the current petition  
 16 does not name the proper respondent for a habeas proceeding, this Court lacks jurisdiction to  
 17 entertain the action.

18 For the foregoing reasons, **no later than April 24, 2014**, petitioner is ordered to show  
 19 cause why the Petition should not be dismissed without prejudice for failure to exhaust state  
 20 remedies and for failure to name a proper respondent. Filing by petitioner of an Amended Petition  
 21 -- on the Central District of California's form Petition for Writ of Habeas Corpus -- clearly showing  
 22 that petitioner has exhausted his state judicial remedies and naming a proper respondent shall be  
 23 deemed compliance with this Order to Show Cause. **Petitioner is advised that his failure to**  
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25 <sup>1</sup>(...continued)  
 26 does not excuse petitioner's failure to exhaust. Addressing the violation of federal laws by a state  
 27 court is a core function of habeas corpus relief. See 28 U.S.C. § 2254 ("[A] district court shall  
 28 entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to  
 the judgment of a State court only on the ground that he is in custody in violation of the  
 Constitution or laws or treaties of the United States.").

1 **show in his Amended Petition that he has exhausted his state judicial remedies will result**  
2 **in the action being dismissed for lack of exhaustion. Petitioner is further advised that his**  
3 **failure to timely respond to this Order will result in the action being dismissed for failure**  
4 **to prosecute and failure to follow Court orders.**

5 The Court Clerk is directed to send petitioner a copy of his current Petition, together with  
6 blank copies of the forms required when filing a Petition for Writ of Habeas Corpus by a Person  
7 in State Custody. Any Amended Petition or other filing with the Court shall use the case number  
8 assigned to this action.

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11 DATED: April 3, 2014



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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE